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No. 98-1836

In the Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner wishes to call this Court's attention to two significant new decisions that were rendered subsequent to the filing of the Reply Brief for Petitioner.

On August 2, 1999, the United States Court of Appeals for the First Circuit decided *Danca* v. *Private Health Care Systems, Inc.*, ___ F.3d ___, No. 98-1754, 1999 WL 552604, a case in which the court was confronted with medical malpractice claims closely analogous to those asserted here but engaged in an ERISA preemption analysis that irreconcilably conflicts with that performed by the Pennsylvania Supreme Court in this case.

In *Danca*, just as in this case, plaintiff's physician recommended treatment at a particular hospital but the defendant HMO denied precertification for treatment at that hospital and instead precertified the plaintiff's admission to a different hospital. The plaintiff alleged that the hospital to which she was admitted was "inappropriate" and rendered inadequate care. 1999 WL 552604 at *1.

The gravamen of the plaintiff's claims in *Danca* was that the HMO had acted negligently in failing to precertify her admission to the hospital recommended by her physician. The First Circuit held that this conduct "was indisputably part of the process used to assess a participant's claim for a benefit payment under the plan," and therefore any state law attack on this conduct would amount to an "alternative enforcement mechanism" to the civil enforcement provisions in Section 502(a) of ERISA, 29 U.S.C. § 1132(a). *Id.* at *4. As such, the court concluded that these claims "are both completely preempted [under Section 502(a)], justifying removal, and preempted by ERISA § 514, justifying dismissal." *Id.* at *5. The court acknowledged that "the practical result" of its decision was to leave the plaintiff without a remedy for the HMO's alleged negligence in refusing to precertify her admission to the hospital recommended by her physician, but it emphasized that "it is the job of Congress and not this Court to provide for such a remedy if it sees fit." *Id.* at *6 n.10.

The Eighth Circuit reached a similar decision in *Hull* v. *Fallon*, ___ F.3d ___, No. 99-1036, 1999 WL 637073 (Aug. 23, 1999), a case in which a plan subscriber sued the administrator of his health plan for medical malpractice after the plan administrator denied preauthorization for a medical test requested by the subscriber's treating physician. The Eighth Circuit held that the plaintiff's claim, even if styled as medical malpractice, was based on a denial of benefits. *Id.* at *3. As such, it fell squarely within the scope of ERISA Section 502(a) and was completely preempted.[1] *Id.* at *3. As the court explained, to hold that malpractice claims based on denial of authorization for benefits "are not preempted would be to expose plan administrators to varying state causes of action for claims within the scope of section 502(a)," in violation of this Court's decision in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987).

The *Hull* decision is also notable because, in the course of holding that ERISA Section 502(a) applied to the plaintiff's medical malpractice claim, the Eighth Circuit reaffirmed its prior decision in *Kuhl* v. *Lincoln National Health Plan, Inc.*, 999 F.2d 289 (8th Cir. 1993), which pre-dated *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995). *Kuhl* is strikingly similar to this case: it involved medical malpractice and other common law claims based on a plan administrator's refusal to authorize medical treatment at a non-participating hospital as requested by the subscriber's treating physician. 999 F.2d at 300. The *Kuhl* court held that those claims were preempted under Section 514(a) of ERISA, a holding that cannot be reconciled with the decision below.

The recent *Danca* and *Hull* decisions thus deepen even further the conflict between the Pennsylvania Supreme Court and the federal appellate courts over whether Section 514(a) of ERISA preempts negligence claims against an HMO arising from the administration of claims for benefits under an ERISA plan. See Pet. 15-17. Many of the federal appellate decisions finding

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[1] As petitioners have explained, where a claim is completely preempted under Section 502(a) of ERISA it is also preempted under Section 514(a) of ERISA. See Pet. 14 n.3; see also Pet. Reply Br. 6.

preemption, like *Danca* and *Hull*, post-date this Court's decision in *Travelers*, 514 U.S. 645, and continue to rely on this Court's holding in *Pilot Life*, 481 U.S. at 56. The First and Eighth Circuits obviously disagree with the Pennsylvania Supreme Court's view that *Pilot Life* was overruled *sub silentio* in *Travelers* and is "superannuated." Pet. App. 9a.

Moreover, the First Circuit's declaration in *Danca* that it is within the sole province of Congress to amend ERISA if it sees fit to do so stands in stark contrast to the Pennsylvania Supreme Court's judicial evisceration of the preemption afforded by ERISA Section 514(a) through its sweeping holding that "negligence claims against a health maintenance organization do not 'relate to' an ERISA plan." Pet. App. 11a. The conflict between that unprecedented construction of Section 514(a) and the intent of Congress was further manifested during the recent debate on the Patients' Bill of Rights Act of 1999, when the Senate refused to adopt proposed amendments to ERISA Section 514 that would have allowed personal injury lawsuits against HMOs. See Pet. Reply Br. 9-10.

The negligence claims in this case and *Danca* are identical inasmuch as they both arise from an HMO's precertification decision not to approve a subscriber's admission to the particular hospital desired by the subscriber's physician. The malpractice claim in *Hull* is also strikingly similar, resting on a preauthorization decision not to approve a particular treatment requested by the subscriber's physician. Nonetheless, the conflicting approaches to ERISA preemption taken by the Pennsylvania Supreme Court and First and Eighth Circuits yielded dramatically conflicting rulings. In light of the direct and recurring conflict between the Pennsylvania Supreme Court's decision and the decisions of numerous federal courts of appeals, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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